

Before the
Administrative Hearing Commission
State of Missouri



STATE BOARD OF NURSING,

Petitioner,

vs.

BRENDA COLEMAN,

Respondent.

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No. 10-1322 BN

DECISION

Brenda Coleman is subject to discipline because she used a controlled substance while on duty as a licensed practical nurse.

Procedure

On July 12, 2010, the State Board of Nursing (“the Board”) filed a complaint seeking to discipline Coleman. On July 21, 2010, we served Coleman with a copy of the complaint and our notice of complaint/notice of hearing. Coleman did not file an answer. We held hearings on March 1, 2011, and August 30, 2011. Tina Crow Halcomb appeared for the Board. Brenda Coleman did not appear at the first hearing and appeared *pro se* at the second hearing. The matter became ready for our decision on December 23, 2011, the date the last written argument was filed.

The Board served a request for admissions on Coleman on January 24, 2011. Coleman did not respond to the request. Under Supreme Court Rule 59.01, the failure to answer a request

for admissions establishes the matters asserted in the request, and no further proof is required.¹ Such a deemed admission can establish any fact or any application of law to fact.² That rule applies to all parties, including those acting *pro se*.³ Regulation 1 CSR 15-3.420(1) applies that rule to this case.

Findings of Fact

1. Coleman is licensed by the Board as a licensed practical nurse (“LPN”). Her license is current and active and was so at all relevant times.

2. Coleman was employed as a LPN at the John Knox Village Care Center at all relevant times.

3. On July 9, 2009, John Knox asked Coleman to submit to a controlled substance test while on duty.

4. Coleman tested positive for morphine, oxycodone, propoxyphene, and oxymorphone.

5. Coleman did not have a prescription for any of these drugs at the time of the positive test.

Conclusions of Law

We have jurisdiction to hear the complaint.⁴ The Board has the burden of proving that Coleman has committed an act for which the law allows discipline.⁵ The Board argues that there is cause for discipline under § 335.066:

2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any certificate of registration or authority, permit or license required by sections 335.011 to 335.096 or any person who has failed to renew or has surrendered his or her

¹ *Killian Constr. Co. v. Tri-City Constr. Co.*, 693 S.W.2d 819, 827 (Mo. App. W.D. 1985).

² *Linde v. Kilbourne*, 543 S.W.2d 543, 545-46 (Mo. App. W.D. 1976).

³ *Research Hosp. v. Williams*, 651 S.W.2d 667, 669 (Mo. App. W.D. 1983).

⁴ Section 621.045. Statutory references, unless otherwise noted, are to the 2012 Supplement to the Revised Statutes of Missouri.

⁵ *Missouri Real Estate Comm’n v. Berger*, 764 S.W.2d 706, 711 (Mo. App. E.D. 1989).

certificate of registration or authority, permit or license for any one or any combination of the following causes:

(1) Use or unlawful possession of any controlled substance, as defined in Chapter 195, or alcoholic beverage to an extent that such use impairs a person's ability to perform the work of any profession licensed or regulated by sections 335.011 to 335.096;

(5) Incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of any profession licensed or regulated by sections 335.011 to 335.096;

(12) Violation of any professional trust or confidence;

(14) Violation of the drug laws or rules and regulations of this state, any other state or the federal government[.]

Coleman admitted facts and that those facts authorize discipline. However, we must “separately and independently” determine whether such facts constitute cause for discipline.⁶ Therefore, we independently assess whether the facts admitted allow discipline under the law cited.

Subdivisions (1) and (14) – Unlawful Drug Possession and Unlawful Drug Use

The Board argues that Coleman violated a drug law and unlawfully possessed controlled substances.

Morphine, oxycodone, propoxyphene, and oxymorphone are controlled substances.⁷

Coleman violated § 195.202.1 by possessing these substances:

⁶ *Kennedy v. Missouri Real Estate Commission*, 762 S.W.2d 454, 456-57 (Mo. App. E.D. 1988).

⁷ Section 195.017.4(1)(a).

Except as authorized by sections 195.005 to 195.425, it is unlawful for any person to possess or have under his control a controlled substance.

Coleman's unlawful possession of these substances may be inferred from the fact that she tested positive for these substances and therefore used them in the past. Coleman's possession was unlawful because she did not have a prescription for any of these substances. Coleman is subject to discipline under § 335.066.2(1) and (14).

.Subdivision (5) – Professional Standards and Honesty

Incompetency is a general lack of professional ability, or a lack of disposition to use an otherwise sufficient professional ability, to perform in an occupation.⁸ We follow the analysis of incompetency in a disciplinary case from the Supreme Court, *Albanna v. State Bd. of Reg'n for the Healing Arts*.⁹ Incompetency is a "state of being" showing that a professional is unable or unwilling to function properly in the profession.¹⁰

Misconduct means "the willful doing of an act with a wrongful intention[;] intentional wrongdoing."¹¹ Gross negligence is a deviation from professional standards so egregious that it demonstrates a conscious indifference to a professional duty.¹² Fraud is an intentional perversion of truth to induce another, in reliance on it, to part with some valuable thing belonging to him.¹³ It necessarily includes dishonesty, which is a lack of integrity or a disposition to defraud or deceive.¹⁴ Misrepresentation is a falsehood or untruth made with the intent and purpose of deceit.¹⁵

⁸ *Tendai v. Missouri State Bd. of Reg'n for the Healing Arts*, 161 S.W.3d 358, 369 (Mo. 2005).

⁹ 293 S.W.3d 423 (Mo. 2009).

¹⁰ *Id.* at 435.

¹¹ *Missouri Bd. for Arch'ts, Prof'l Eng'rs & Land Surv'rs v. Duncan*, No. AR-84-0239 (Mo. Admin. Hearing Comm'n Nov. 15, 1985) at 125, *aff'd*, 744 S.W.2d 524 (Mo. App. E.D. 1988).

¹² *Id.* at 533.

¹³ *State ex rel. Williams v. Purl*, 128 S.W. 196, 201 (Mo. 1910).

¹⁴ MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 359 (11th ed. 2004).

¹⁵ *Id.* at 794.

Coleman was under the influence of controlled substances while on duty. This single act is not enough to constitute incompetence. The conduct was intentional, so we find misconduct. There is no evidence of fraud, misrepresentation, or dishonesty. The Board presented no expert evidence about the standards applicable to LPNs and controlled substance use, so we cannot find gross negligence.¹⁶

There is cause for discipline under § 335.066.2(5).

Subdivision (12) – Professional Trust or Confidence

The Board argues that Coleman violated a professional trust or confidence. Professional trust is the reliance on the special knowledge and skills that professional licensure evidences.¹⁷ It may exist not only between the professional and his clients, but also between the professional and his employer and colleagues.¹⁸

Coleman violated professional confidence when she was under the influence of controlled substances while on duty. There is cause for discipline under § 335.066.2(12).

Summary

Coleman is subject to discipline under § 335.066.2 (1), (5), (12), and (14).

SO ORDERED on April 4, 2013.

/s/ Nimrod T. Chapel, Jr.
NIMROD T. CHAPEL, JR.
Commissioner

¹⁶ *Luscombe v. State Board of Nursing*, no. WD75049 (Mo. App. W.D., Jan. 8, 2013) (slip op. at 16-17).

¹⁷ *Trieseler v. Helmbacher*, 168 S.W.2d 1030, 1036 (Mo. 1943).

¹⁸ *Cooper v. Missouri Bd. of Pharmacy*, 774 S.W.2d 501, 504 (Mo. App. E.D. 1989).